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FILED

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EDWARD E. ANDERSON
U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

6 IN THE UNITED STATE DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO-BRANCH

9 EDWARD E. ANDERSON,

10 Plaintiff,

11 vs

12 AMR The parent of AMERICAN AIRLINES
13 INC. AMERICAN AIRLINES and Does 1
14 through 5, inclusive.

15 Defendants

) Case No. 07-CV-3527 WHA

) **AMENDED**

) PLAINTIFF'S MEMORANDUM OF POINTS
) AND AUTHORITIES IN OPPOSITION TO
) DEFENDANTS MOTION FOR SUMMARY
) JUDGMENT AND /OR SUMMARY
) ADJUDICATION OF CLAIMS AND OR
) JUDGMENT ON THE PLEADINGS;
) ~~DECLARATION OF EDWARD E.~~
) ~~ANDERSON~~

) Date: May 29, 2008

) Time: 8:00 a.m.

) Court: 9

) Hon. William Alsup

17
18 **A. INTRODUCTION.**¹

19 Plaintiff is an African American, who has worked as a sky cap for
20 American Airlines since 2001. Plaintiff was age 73, when he filed his discrimination claim in
21 January, 2006. At age 73, plaintiff was the oldest sky cap who work worked for American
22 Airlines, whether as an employee of American Airlines or as an employee of G-2, an
23 independent contractor who provided sky caps to American Airlines. The next oldest was 60
24 years old, and the rest in their 50's or 40's or younger.

25
26 ¹AMENDED ONLY TO CORRECT TYPING, GRAMMAR, ERRORS

27 Case No. 07-03527 WHA

28 Plaintiff's Memo of Ps and As

in Opposition to Summary Judgment 1

1 Over the years, the number of African American sky who worked for American
2 Airlines as employees or as employees of its independent contractor, has continued to dwindle
3 through attrition and the hiring practices of American Airlines and its independent contractor,
4 who have hired Caucasian and Filipino employees, but no African American employees.
5 Plaintiff is now the sole remaining African American sky cap on his shift.

6 In August, 2005, when American Airlines adopted a \$2 per baggage service fee to be
7 collected by sky caps, plaintiff was the principal sky cap who publicly protested the \$2 per
8 baggage fee because it would significantly reduce tip income, upon which sky caps depended
9 for the major portion of their income. Plaintiff requested that he be restored to the six hour
10 shift, that had been denied him since 2001 to make up for the lost tip income.

11 On August 11, 2005, a supervisor from American Airline's met privately with Plaintiff
12 and demanded that Plaintiff sign a letter agreeing to the \$2 per baggage policy. Plaintiff was
13 told to sign the letter or retire. After Plaintiff refused to sign the letter, he was not terminated.
14 Instead Plaintiff was treated like a pariah. He was assigned to the least desirable baggage
15 station by himself, and isolated from other sky caps. Plaintiff was again denied a six hour
16 shift, although other American Airline employees in all levels operation from baggage handler
17 to station agent, were able to work six hour shifts. Plaintiff was prohibited for working at the
18 other station where other sky caps worked, regardless of the circumstances. If his baggage
19 checking machine broke down, plaintiff could do nothing but wait for it to be fixed, while the
20 other sky caps were not limited to one location, and if their machine broke down, they were
21 allowed to use any machine that was available, including plaintiff's baggage check machine.

22 As a result of these actions toward plaintiff, plaintiff suffered a substantial reduction in
23 tip income, and prestige among his fellow sky caps. By these actions, American Airlines
24 sought to induce plaintiff to retire. Instead, in January, 2006, Plaintiff filed a discrimination
25 complaint with the California Department of Fair Employment and Housing, alleging age and
26 race discrimination, retaliation for exercising protected rights, and upon issuance of a Right to
27

Case No. 07-03527 WHA

Plaintiff's Memo of Ps and As

in Opposition to Summary Judgment

1 Sue Letter, plaintiff filed this action in State Court alleging age and race discrimination,
2 harassment, retaliation for asserting protected rights, and negligent and intentional infliction of
3 emotional distress. Plaintiff has also filed a timely motion to amend the complaint before the
4 court to add a California Statutory Cause of Action, alleging that the \$2 baggage fee that was
5 initiated by American Airlines in August, 2005 violates California Labor Code Section 351
6 because it diverts gratuity income that belongs to the employee to the employer.

7 This court should deny defendant's motion for summary judgment and adjudication,
8 and should grant plaintiff request for leave to amend the complaint to allege violation of
9 California Labor Code Section 351.

10 **B. STATEMENT OF FACTS**

11 Evidentiary Factual Allegation The factual evidence in support of plaintiff's allegation,
12 and in opposition to defendant's Motion for Summary Judgment includes (1) The evidentiary
13 factual allegation in Plaintiff's Verified Complaint, (2) The Declaration of Plaintiff filed
14 herewith, (3) the Deposition Testimony of Plaintiff, (5) the Responses to Discovery provided
15 by plaintiff, and (4) the Declaration of Frederick C. Roesti, and exhibits.

16 Status of Plaintiff Prior to American Airline's purchase of TWA, plaintiff worked a
17 six hour shift for TWA as a sky cap. In 2001, under the terms of American Airline purchase
18 of TWA, approved by a bankruptcy judge, former TWA sky caps, including Plaintiff, where
19 to become employees of American Airlines under a status quo agreement, which provided for
20 the same working conditions, seniority, compensation, they enjoyed under the TWA contract
21 until it expired by attrition. Other American Airlines sky caps were employees of an
22 independent contractor, G-2, that provided sky caps to America Airlines. (Complaint,
23 Anderson Deposition, Page 39, 69, 67, 142, 181; Anderson Declaration, par 3, 4)

24 In 2001, at the time of the purchase, there were approximately seven African American
25 sky caps who worked for American Airlines, and on plaintiff's shift, there were three African
26 American sky caps, including Plaintiff. The total number African American sky caps at

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2 American Airlines to plaintiffs knowledge has dwindled to two African American sky caps,
3 including Plaintiff, and Plaintiff is the sole remaining African American sky caps on his shift
4 This was the result of hiring practices due to attrition that have not hired African American
5 sky caps since 2001 (Anderson Declaration, par 8-9)

6 In December 20, 2001, when American Airlines bought out TWA, American Airlines
7 required the former TWA sky caps, including Plaintiff, to sign a letter that listed their income
8 as \$10.46 per hour, and stated, "If you choose not to accept the above position or do not report
9 for work when advised, you will have no status with AA." Although plaintiff signed this
10 letter, defendant American Airlines was still bound to the status quo agreement regarding
11 terms of employment, gratuities, seniority, shift selection, etc. When supervisors for
12 American Airlines disputed the continued operation of the status quo agreement, Plaintiff
13 referred them to Dallas (the American Airline headquarter), and the supervisors reported back
14 to Plaintiff that he was right (Anderson Deposition, 38-39).

15 However, instead of placing plaintiff on a six hour shift, as he requested, plaintiff was
16 told that American Airlines did not have six hour sifts, and the shift available to him was a
17 four shift (Anderson Deposition, page 39-40). Later plaintiff learned that this representation
18 was false. By August, 2005, plaintiff learned that American Airlines allowed employees at all
19 level of its operation to work six hours shifts from baggage handler, to ramp man, to station
20 agent (Anderson Declaration)

21 August, 2005: Implementation of \$2 per bag service fee.

22 In August, 2005, American Airlines announced that it was instituting a \$2 dollar per
23 bag baggage service fee, so that sky caps checked in baggage as they had done before, when
24 customers paid tips to sky caps, but now the sky caps would collect a \$2 per bag service fee
25 from customers, and sky caps would turn the \$2 per bag fee over American Airlines, or G-2,
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2 in the case of sky caps who worked for G-2 for American Airlines. Plaintiff was the principal
3 sky cap who protested this new policy because it would significantly reduce tip income, that
4 sky caps relied upon (Anderson Deposition, page 75-76, 89, 131-136). Plaintiff renewed his
5 request for a six hour hour shift. In the normal of things, but for discrimination on the basis of
6 age and race, Plaintiff would have been assigned to a six hour shift from 8:00 a.m. to 2:00
7 p.m. since December, 2001, and from August, 2005 due to (1) his seniority, (2) the terms of
8 the status quo agreement between American Airlines and TWA covering the skycaps, that was
9 approved by a Bankruptcy Judge, and (3) the fact that Plaintiff was an employee of American
10 Airlines under the status quo agreement, while other sky caps were employed by an
11 independent contractor, G-2, that contracted with American Airlines to provide sky cap
12 services (Anderson Deposition).

13 When Defendant's agents approached Plaintiff, individually, to sign an agreement
14 agreeing to the \$2 baggage fee, and plaintiff refused, Plaintiff was told to sign the agreement
15 or retire.

16 Discrimination, Retaliation and Harassment.

17 Defendants did not retire plaintiff by termination, but they embarked on a course of
18 action that treated him like a pariah. Plaintiff was assigned to the least desirable baggage
19 station by himself, and isolated from other skycaps. Plaintiff was again denied a six hour
20 shift, although other American Airline employees in all levels operation from baggage handler
21 to station agent, were able to work six hour shifts. Plaintiff was prohibited for working at the
22 other station where other sky caps worked, regardless of the circumstances. If Plaintiff's bag
23 checking machine broke down, plaintiff was prohibited from working elsewhere. He could do
24 nothing but wait it to be fixed, while the other sky caps were not limited to one location, and if
25 their machine broke down, they were allowed to use any machine that was available, including
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2 plaintiff's baggage check machine (Anderson Deposition 39, 53-55, 74-76, 89-92, 98-102).

3 This conduct by American Airlines cut deeply into plaintiffs tip income, and its
4 isolation of plaintiff, and discriminatory conduct toward him was observed by and is
5 recorded in sworn statements of other sky caps. See Anderson Declaration.

6 Filing of Complaint

7 On January 24, 2006, Mr. Anderson filed his complaint of age and race
8 discrimination, and claim of retaliation with DFEH. He received a right to sue letter, dated
9 August 2, 2006. On January 9, 2007, Mr. Anderson filed the present complaint, alleging (1)
10 Age discrimination in violation of FEHA, (2) Race discrimination in violation of FEHA, (3)
11 Retaliation for exercising protected civil and employment rights in refusing to sign the
12 August, 2005 letter in violation of FEHA, among other things (4) Negligent infliction of
13 emotional damages, and (5) Intentional infliction of emotional damages, and with this
14 opposition to defendant's motion for summary judgment, plaintiff has filed a timely motion to
15 amend the complaint to allege the \$2.00 baggage fee was improper diversion of skycap
16 gratuities to American Airlines in violation of California Labor Code Section 351.

17 **C. ARGUMENT**

18 **1. This Court cannot grant summary judgment for defendant because there are**
19 **genuine issues as to the material facts.**

20 Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant
21 summary judgment only if there is a showing that there is no genuine issue as to any material
22 fact on which Plaintiff may be able to prevail. In the present matter the Defendant wishes to
23 side step the issues presented in this matter. Defendants provide declarations from several
24 employees of American Airlines, but the declarations avoid the issues that are presented by
25 Plaintiff in this case, and at most present issues of fact for the trier of fact.

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2 Furthermore, the declarations submitted on behalf of Defendant omit the following
3 factual allegations in Plaintiff's verified complaint. First, that Mr. Anderson was only allowed
4 to work a four hour shift verses the original 6 hour shifts. Second, that he was allowed to
5 move to the different areas until the August 2005 policy shifts. Then, Mr. Anderson was
6 required to remain at only one location. Third, the declarations fail to address the
7 consequence of said policy, which is the basis of this action. Fourth, the declarations fail to
8 mention the letter that Mr. Anderson was requested to sign when American Airlines was
9 changing their policy in August, 2005. Finally, the declarations do not address the
10 consequence of the new tip policy. Nor do they address the allegations that Mr. Anderson was
11 originally told sky caps could not accept tips, or that American Airlines supervisors took down
12 the hand written signs by Plaintiff that the \$2 per bag service was not a tip and did not go to
13 skycaps. The disputed facts presented in this case require the court to deny Defendant's
14 motion for Summary Judgment.

15 **2. Plaintiff is not barred by any Statute of Limitations under State Law.**
16

17 In this matter the first and second cause of action alleged several actions taken by
18 Defendant against Plaintiff to show violation of the California fair Employment and Housing
19 act (FEHA"). The Defendant focused only on one of the alleged acts by American Airlines
20 and chose to ignore the crux of the complaint in order to make their Statute of Limitation
21 claim. Plaintiff ignores the crux of the complaint, i.e. what happened to plaintiff after the
22 August, 2005 institution of its \$2 per bag service charge, when Mr. Anderson was requested to
23 sign a letter of resignation, when Mr. Anderson was no longer allowed to move from his
24 location, and when he was given a substandard location despite his seniority. It ignores the
25 fact that Mr. Anderson filed his complaint with California Department of Fair Employment
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2 and Housing in January 2006, received a right to sue letter in August 2006, and filed this
3 complaint in state court in January 2007.

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5 The cases cited by Defendant, *Taylor v. City of Los Angeles Dept. of Water & Power*
6 (2006) 144 Cal App. 4th 1216, allowed the Plaintiff to proceed since the actions by the
7 Defendant were material to his claims. In *Porter v. California Department of Corrections* 383
8 F3rd 1018 1031-1032 (2004) also cited by the Defendant, the court ruled that the Summary
9 Judgment motion granted in the District Court must be overturned. The *Porter* case
10 concerned a sexual harassment and retaliation case concerning Ms. Porter and the CDC. The
11 court held the continuing acts upon which the complaint was filed were sufficient to defeat the
12 Statute of Limitation problem.

13 Finally, as defendants admit, the discriminatory conduct is not limited to what
14 happened after August, 2005, but also extends back to December, 2001, because these
15 were not "discrete acts" that were not repeated. They consisted of actions that followed
16 August 1, 2005, including discriminatory actions that preceeded August, 2005.

17 **3. Age Discrimination**

18
19 Mr. Anderson a 73 year old African American man was treated differently than
20 younger skycaps after he joined American Airlines, both before August, 2005 and after
21 August, 2005. In addition to having fewer hours than the other skycaps, that limited him to
22 working only four hour sifts, when the 2005 policy in baggage handling was modified and Mr.
23 Anderson refused to sign a resignation letter, he was treated to as a second class citizen,
24 directed toward his age, to encourage him to retire or resign. This treatment caused him to
25 earn less income and in fact to be separated from the rest of the skycaps. In *Horn v. Cushman*

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2 & *Wakefield Western, Inc.* (1999) 72 Cal App 4th 798 85 Cal Rptr 2d 459, the court allowed
3 Summary Judgment against the Plaintiff as a result of the termination of the employee
4 because, in that case, there was a legitimate case of restructuring. Here, Mr. Anderson was not
5 terminated. He was put in a less desirable position. The institution of the \$2 per bag service
6 fee was not a restructuring, per se. The discrimination on the basis of age arose from the fact
7 that he was singled out, required to work in one place, prohibited from changing location like
8 other skycaps –after he was invited sign a letter of resignation, and refused.
9

10 **4. Race Discrimination**

11 Plaintiff alleges that Defendant took the actions against Mr. Anderson as an African
12 American, who was treated differently than the other skycaps. The specific allegations are set
13 forth above. Clearly, American Airlines treatment of Mr. Anderson was attributed to a
14 number of factors, and including its policy of excluding African American sky caps through it
15 attrition and hiring practice from December, 2001, his age, and retaliation. In *Equal*
16 *Employment Opportunity Commission v. Crown Zellerbach Corp* 720 F.2d 1008, 1014-1016
17 (1983) the court ruled that a defendant must be able to articulate a legitimate,
18 nondiscriminatory reason for its actions. In the present matter no such articulation has been
19 forth coming from Defendant.
20

21 **5. Retaliation**

22 American Airlines embarked upon a new more virulent level of discrimination
23 once Mr. Anderson refused to sign the letter of resignation, and when Mr. Anderson protested
24 the \$2 baggage service and other fees, that affected sky cap income. Mr. Anderson was no
25 longer allowed to be where the bulk of the passengers were being loaded, nor was he able to
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2 use any machine if his was broken. The booth used by Mr. Anderson was on wheels so he
3 could have moved to where the passengers were loading, but for American Airlines's refusal.
4 American Airlines did not want to have Mr. Anderson around any longer and they felt their
5 action would cause him to quit. In *Vasquez v. County of Los Angeles*, (2001) 349 F.3rd 349
6 the court stated that the Defendant must offer a legitimate reason for changing its policy
7 towards Plaintiff. Unlike the *Vasquez* case Mr. Anderson position was not changed nor was
8 he fired because of his work. He has presented a present a prima facia case sufficient to
9 withstand summary judgment because the actions of American Airlines occurred after he
10 refused to sign a letter of resignation.
11

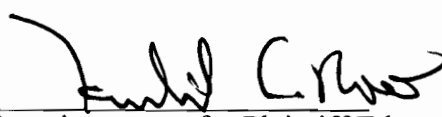
12 **6. Intentional and Negligence Infliction of Emotional Distress**

13 Defendant cites *Fermino v. Fedco Inc.* (1994) 7 Cal 4th 701 30 Cal Rptr. 2d 18 in
14 its brief to avoid intentional infliction of emotional distress. The court in that case allowed a
15 charge of false imprisonment to go forward despite the Defendant's claim that workers
16 compensation law provided the exclusive remedy. The court stated that acts that are not in the
17 normal course of business can not be defeated by demur. Furthermore, here, apart from the
18 discrimination allegations, there is sufficient evidence to support the intentional or the
19 negligent infliction of emotional distress.
20

21 **D. CONCLUSION**

22 For all of the above reasons, the defendant's motion for summary judgment must be
23 denied.

24 Dated: May 15, 2008

Submitted by: 
Frederick C. Roesti, attorney for Plaintiff Edward Anderson

PROOF OF SERVICE BY FAX AND MAIL

I, the undersigned declare:

I am over the age of eighteen. I am not related to the parties in this action. I may be reached at the Law Office of Frederick C. Roesti, 1095 Market Street, San Francisco, CA 994103, Tel (415) 552-3733.

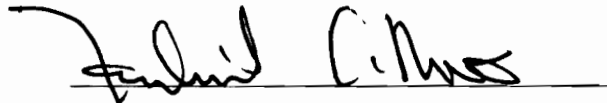
I served the the following documents:

AMENDED PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT;

By FAX and by MAIL as follows: I faxed the documents to the following fax number and I mailed documents by placing them in an envelope with postage paid and placed in the United States Mail addressed to:

Fax (916) 561-0828
Kenneth R. O'Brien, Esq,
Littler Mendelson
2520 Ventura Oaks Way, Suite 390
Sacramento, CA 95833-4227
on the date listed below.

I have read the above statement and declare under penalty of perjury under the laws of the State of California that it is true and correct and was executed in San Francisco, California on May 19, 2007



Frederick C. Roesti